

Internal Revenue Service

Department of the Treasury
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Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-137634-08

Date:

February 19, 2009

In Re:

Legend

Decedent =
Date 1 =
Spouse =
Daughter =
Grandchild 1 =
Grandchild 2 =
Year 1 =
Date 2 =
Date 3 =
Marital Trust =
A
Marital Trust =
B
Date 4 =
Attorney =
\$X =
\$Y =

Dear :

This is in response to your letter dated June 17, 2008, and subsequent correspondence, with respect to the above captioned estate, requesting an extension of time under section 301.9100-1 of the Procedure and Administration Regulations to elect, under § 26.2652-2(c) of the Generation-Skipping Transfer (GST) Tax Regulations, to treat Marital Trust A as two separate trusts for GST tax purposes.

Facts

Decedent died testate on Date 1, survived by Spouse, Daughter, Grandchild 1 and Grandchild 2. Daughter was appointed executrix of Decedent's estate. Final distribution of the estate was made in Year 1. Spouse died on Date 4.

Decedent's will, dated Date 2, and modified by codicil on Date 3, bequeathed her residuary estate to two trusts. Article Fourth, Paragraph A creates Marital Trust A to be funded with \$X. Article Fourth, Paragraph B, creates Marital Trust B to be funded with the balance of the residuary estate. Under the terms of both trusts, Spouse is entitled to receive, for life, all the trust income payable annually, and so much of the corpus as the trustee shall determine in her absolute discretion.

Article Fifth provides that on Spouse's death, Marital Trust A is to be divided into two subtrusts, Grandchild 1 Trust and Grandchild 2 Trust. If Daughter is living on Spouse's death, then Daughter is to receive the trust income from both trusts for her life. Upon Daughter's death, if the respective Grandchild for whom the trust is named has attained age 35, the trust is to terminate and the corpus is to be distributed outright to the Grandchild. If the Grandchild has not attained age 35, the corpus is to be held in further trust until that Grandchild attains the age of 35.

Under Article Sixth, on Spouse's death, Marital Trust B is to be distributed outright to Daughter, or, if she is not then living, to her then living issue per stirpes if they have attained the age of 35. Otherwise, the balance is to be held in further trust for her issue.

Daughter, as executrix, hired Attorney to assist her in the administration of Decedent's estate, including the preparation of the Decedent's Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. On Schedule M of the return Executrix made a qualified terminable interest property (QTIP) election under § 2056(b)(7) with respect to Marital Trust A and Marital Trust B. On Schedule R, the executor made a reverse QTIP election under § 2652(a)(3) with respect to Marital Trust A, and allocated \$Y of Decedent's GST exemption with respect to Marital Trust A. However, because Marital Trust A was funded with \$X, an amount in excess of \$Y, the \$Y allocation was not sufficient to produce a zero inclusion ratio with respect to Marital Trust A.

Daughter, as Executrix, has requested an extension of time to make the election under § 26.2652-2(c) to treat Marital Trust A as two separate trusts for GST Tax purposes. One trust, the GST Exempt Marital Trust, will have an inclusion ratio of zero and the other trust, the GST Non-Exempt Marital Trust, will have an inclusion ratio of one for purposes of the GST tax. The GST Exempt Marital Trust will be funded with an amount calculated by multiplying the current fair market value of the entire trust by a fraction, the numerator of which is Y (the amount of GST exemption originally allocated to Marital Trust A) and the denominator of which is X (the amount passing to Marital

Trust A under the terms of Decedent's will. The Non-exempt Marital Trust will be funded with the balance of the Marital Trust A corpus.

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Under § 2056(b)(7)(A), "qualified terminable interest property" is treated as passing to the surviving spouse for purposes of § 2056(a) and no part of the property is treated as passing to any person other than the surviving spouse. Qualified terminable interest property is defined under § 2056(b)(7)(B)(i) as property: (1) which passes from the decedent to the surviving spouse; (2) in which the surviving spouse has a qualifying income interest for life; and (3) to which an election under § 2056(b)(7)(B)(v) applies. Under, § 2044, property subject to a QTIP election for which a deduction is allowed under § 2056(b)(7), is includible in the surviving spouse's gross estate on that spouse's subsequent death.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Section 2601 imposes a tax on every generation-skipping transfer (GST) made by a transferor to a skip person. A GST is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip.

Section 2602 provides that the amount of the GST tax is determined by multiplying the taxable amount by the applicable rate. Section 2641(a) provides that the term "applicable rate" means with respect to any GST transfer, the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer.

Under 2642(a)(1), the inclusion ratio with any property transferred in a generation-skipping transfer is generally defined as the excess of 1 over the "applicable fraction". The applicable fraction, as defined in 2642(a)(2) is a fraction, the numerator of which is the amount of GST exemption under 2631 allocated to the trust (or to property transferred in a direct skip), and the denominator is the value of the property transferred to the trust or involved in the direct skip.

Section 2631(a) as in effect on Date 2, provided that for purposes of determining the inclusion ratio, every individual is allowed a GST exemption of \$1,000,000 that may be allocated by the individual (or his executor) to any property with respect to which the individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, is irrevocable.

Section 2632(a)(1) provides that an individual's GST exemption may be allocated at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such return is required to be filed. Under § 26.2632-1(d)(1), an allocation of a decedent's available GST exemption by the executor of the decedent's estate is made on Form 706 filed on or before the date prescribed for filing the return by § 6075(a) (including any extensions granted). An allocation of GST exemption with respect to property included in the gross estate of a decedent is effective as of the date of death.

Section 2642(b)(2) provides generally that if property is transferred as a result of the death of the transferor, the value of the property for purposes of determining the inclusion ratio under § 2642(a)(1) shall be the value of the property as finally determined for estate tax purposes.

Under § 2652(a)(1) and § 26.2652-1(a)(1), the "transferor" of the property for GST tax purposes is the individual with respect to whom the property was last subject to federal estate or gift tax. However, under § 2652(a)(3), in the case of a trust for which a deduction was allowed under § 2056(b)(7), the decedent's estate may elect to treat all of the property in the trust as if the § 2056(b)(7) election had not been made for purposes of the GST tax (i.e., a "reverse QTIP election"). Accordingly, the decedent, and not the surviving spouse, is treated as the transferor of the property for GST tax purposes. The reverse QTIP election is irrevocable and is not effective unless it is made with respect to all of the property in the trust to which the QTIP election applies. Under § 26.2652-2(b), the reverse QTIP election is made on the return of tax on which the QTIP election is made.

Section 26.2652-2(c) provides a special transitional rule applicable in a situation where a reverse QTIP election was made with respect to a trust prior to December 27, 1995. If GST exemption has been allocated to that trust, the transferor (or the transferor's executor) may elect to treat the trust as two separate trusts, one of which has an inclusion ratio of zero by reason of the transferor's GST exemption previously allocated to the trust. The separate trust with the inclusion ratio of zero consists of that fractional share of the value of the entire trust equal to the value of the nontax portion of the trust under section 26.2642-4(a). The reverse QTIP election is treated as applying only to the trust with the zero inclusion ratio. The election is made by attaching a statement to a copy of the return on which the reverse QTIP election was made under 2652(a)(3). The statement must indicate that an election is being made to treat the trust

as two separate trusts and must identify the values of the two separate trusts. The statement must be filed before June 24, 1996.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute).

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based on the facts and representations made, we have determined that the standards of §§ 301.9100-1 and 301.9100-3 have been met. Therefore, an extension of time is granted until 60 days from the date of this letter to make the election under § 26.2652-2(c) to treat Marital Trust A as two separate trusts, as described above.

The election should be made on a supplemental Form 706 (United States Estate (and Generation-Skipping Transfer) Tax Return). The supplemental Form 706 should be filed on behalf of Decedent's estate with the Internal Revenue Service Center, Cincinnati, OH 45999. A copy of this letter should be attached.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Curtis G. Wilson
Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures: Copy for § 6110 purposes

cc: